

Assessing the Current and Future State of Arctic Governance: A Study of Academic Approaches to Arctic Law Development

Nadezhda Filimonova*

In recent years, climate change's impact on the Arctic ecosystem and the increasing interests in developing the Arctic natural resources and shipping routes have raised a question of the future of Arctic governance. Although the concept of governance is rather new, several scholars (Exner-Pirot 2012; Koivurova 2008) point out that the questions of Arctic governance had been discussed already during the Cold War period. As an example, the authors talk about the 1973 "Agreement on the Conservation of Polar Bears" and the 1987 Mikhail Gorbachev's Murmansk speech. Drawing on these cases, one could suggest that the elaboration of Arctic governance has evolved as a top-down process. However, several authors (Pelaudeix 2015) mention that quite a few academic work¹ on Arctic governance were already published in the 1980s. In this view, the vision of

Arctic governance has been forming by academia as well.

Currently, much of the ongoing academic discussions embrace the question of who the legitimate actors are in Arctic governance and what legal arrangements are needed to address promptly the ongoing physical and political transformations in the Arctic region. To tackle these questions, the academic literature presents a wide scope of discussions on Arctic governance. For instance, the issues of governance are analyzed at different levels of jurisdiction: domestic such as Danish policy on Greenland and Canadian policy on Nunavut (Jacobsen 2015; Loukacheva 2007); regional such as the Arctic Council and Polar Code implementation (Ingimundarson 2014; Sakhuja 2014), as well as on international level such as the application of the United Nations Convention on the Law of the Sea (UNCLOS) provisions for the Arctic region (Vylegzhanin 2011). The topic of Arctic governance is also studied through the lens of various issue areas, including fishing (Soliman 2014); natural resources extraction (Baker 2013); environmental issues (Stokke 2011) and shipping (VanderZwaag 2010). In addition, the topic of governance is examined through different policies: building regimes (Lidow 2015) and regime complexes (Young 2012), as well

* Research Assistant, PhD student, University of Massachusetts Boston.

¹ Young, Oran. 1985. "The Age of the Arctic." *Foreign Policy* 61, pp. 160–79; Young, Oran. 1987. "Arctic waters: The Politics of Regime Formation." *Ocean Development and International Law* 18(1), pp. 101–14.

as the elaboration of an Arctic treaty (Rayfuse 2007). Quite a few articles (Bratspies 2015) discuss the impact of human rights norms on Arctic governance. Finally, the issues of governance embrace the topics of inclusion of non-Arctic states (Peng and Njord 2014; Sinha and Gupta 2014) and traditional knowledge of indigenous peoples (Fondahl and Irlbacher-Fox 2009) into the decision-making processes on Arctic governance.

Overall, taking into consideration the existing diversity of approaches, one of the major discussions in the academic literature regarding Arctic governance is whether there is a need for a hard or soft law to govern the region. In this paper, I will examine the concept of Arctic governance by applying a comparative approach to the existing academic literature embracing the issues of Arctic law development. The analysis of scholarly literature will provide us with an understanding of the academic perceptions of the future structure of the Arctic legal regime, its actors, and the structure of Arctic governance, in general. The importance of the understanding of academic stances on Arctic law development lies in the fact that scientists often are assigned by their national governments as experts, therefore, they might have a capacity to influence their states' foreign and national policies (Weible et al., 2012, p. 2). Thus, the study of academics approaches to Arctic law development will help to acquire a deeper

understanding of state and non-state actor's views and interests in the elaboration of new rules for Arctic governance.

As a starting point, I will examine the ongoing academic debates on whether there is a need for an Arctic treaty and its efficiency, or whether the present governance system of the Arctic is sufficient to address the emerging challenges in the region. In the second section, I will unpack the notion of the current governance system of the Arctic by examining different scholars' approaches to the existing rules and norms related to the Arctic. In conclusion, I will discuss the major academic stances with regards to Arctic law development and identify trajectories for further research.

Proposal for a new Arctic treaty

The academic discussions evolved around the Arctic treaty elaboration mainly address the issue of constructing an Arctic governance system based on hard law instruments. Here, the scholars (Rayfuse 2007; Watson 2008; Verhaag 2003) suggest taking the Antarctic Treaty of 1959 as an example and applying it to the Arctic region. Overall, "...the Antarctic Treaty System (ATS) is open to any member state of the UN that conducts substantial research activities there" (Koivurova 2008, 17). Several scholars suggest that the Arctic treaty could incorporate some parts of ATS and its existing practices. For instance, in her

work, Rosemary Rayfuse (2007, 15) proposes that the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) could be applied as a model to the Arctic region for establishing "...a regime responsible for the integrated and holistic management of all oceans-related activities in the Arctic Ocean areas beyond national jurisdiction." In particular, she claims that CCAMLR represents a valuable example of an innovative and precautionary approach to the ocean management since the reason of its adoption was to guarantee the protection of krill stocks in advance of their unregulated exploitation. In her view, she suggests an establishment of a 'Regional Oceans Management Organization' to regulate all commercial activities in the Arctic Ocean.

In addition, in his work, Timo Koivurova (2008) discusses the proposal made by the World Wildlife Fund (WWF) to enhance Arctic governance through the elaboration of a new treaty. The author illustrates that the WWF proposals of the treaty are based on the provisions of the UNCLOS, Polar Code and the 1995 United Nations Straddling Stocks Convention. Mainly, the WWF proposal embraces the following areas for regulation: "creating a network of marine protected areas and special management areas, including a stronger set of regulations for the construction and operation of ships increasingly operating in Arctic waters" (Koivurova 2008, 20). At the same time, Koivurova

underlines that the WWF does not reject the idea of incorporating the ATS experience into Arctic governance. Following Rayfuse's proposals, the WWF suggests including in the treaty an ecosystem-based management based on CCAMLR.

Drawing on the issue of inclusion of various actors in the decision-making process, Sebastien Duyck (2011) suggests that the Arctic states could incorporate the model of Antarctic governance of the differentiated participation of various states. Hence, based on the ATS approach, the author states that "...the regime could be designed in such a way as to identify the level of inclusiveness in the participation to each annex based on the right and entitlement of different categories of states under the law of the sea in relation to the given activity" (Duyck 2011, 13).

However, not all the scholars support the idea that Arctic governance should be based on a solid treaty like the Antarctic Treaty. They present various arguments pertaining to the inefficiency of the elaboration of the hard law instrument for the Arctic region. For instance, Mark E. Rosen and Patricio Asfura-Heim (2013, 23) emphasize that there is no need for such a treaty because "...most areas in the Arctic are under the jurisdiction of the individual Arctic members of the Arctic Council". In addition, Oran Young (2012) suggests that the key provisions of the Antarctic Treaty and the 1991 Environmental

Protocol pertaining to the issues of demilitarization and denuclearization, and prohibition of mining activities do not address the occurring transformations in the Arctic region. All three authors agree that it is not politically feasible to elaborate such a treaty. In contrast, Koivurova (2008) talks about the possible negative consequences of the Arctic treaty adoption for the Arctic indigenous peoples' organizations. Particularly, his main concerns are whether the indigenous organizations will maintain their equal status under the adopted Arctic treaty "...since in almost all other inter-governmental organizations, regimes and negotiation processes, the status of indigenous peoples is only that of an NGO" (Koivurova 2008, 25). Drawing on the discussions presented in this section, the next section will review the literature on the existing legal norms, regime, regime complexes and rules with regards to the Arctic region, focusing on their efficiency and prospective areas for change.

Arctic governance as a set of regimes and regime complex

In academic literature, the question of Arctic governance being a set of rules and norms mainly deals with the topics of regimes and regime complex formation for the Arctic region. This type of literature considers that the existing conventions and agreements constitute the legal regime for the Arctic (Young

2010; Joyer 2009; Hoel 2009; Haftendorn 2013). Therefore, there is no need for the new international Arctic legal regime, as the current legal regime should be enhanced and expanded (Haftendorn 2013, Young 2016). In defining the notion of the regime, the academic works (Young 1998; Pelauideix 2012) mainly apply the notion coined by Stephen Krasner (1982, 186), who defines a regime as an institution "possessing norms, decision rules, and procedures which facilitate a convergence of expectations."

In relation to the existing legal arrangements, the literature emphasizes the critical role of the UNCLOS in setting the regulations for certain important issue areas, including the delineation and negotiation of maritime boundary disputes in the Arctic Ocean based on Article 76 (Young 2010; Joyer 2009); the establishment and maintenance of search and rescue services by applying Article 98 (Sellheim, Zou and Inagaki 2017), and the elaboration and introduction of the marine protection legislation for the ice-covered waters based on Article 234 (Fields 2016; Weidemann 2014). In addition, the literature (Haftendorn 2013; Sellheim, Zou and Inagaki 2017; Young 2016) states that the newly signed and adopted Arctic binding agreements on research-and-rescue and oil spill prevention contribute to the enhancement of the UNCLOS provisions by imposing regulations on the specific issue area. Additionally, several works (Joyer 2009,

Young 2010, Haftendorn 2013) state that the existing Arctic agreements represent parts of the Arctic legal regime.²

Apart from the specific Arctic agreements, the literature states that several international conventions are highly relevant to regulate certain types of activities in the Arctic Ocean. For instance, several works (Hoel 2009; Joyer 2009; Young 2016; Haftendorn 2013) outline the application of international conventions on international shipping and biodiversity in the Arctic region. Several scholars, Young (2016) and Haftendorn (2013), underscore that it will be advantageous for Arctic governance to incorporate international conventions and agreements that are embracing the issues not directly related to the region.³ For instance, Oran Young (2012a, 81) states that "...the efforts to regulate the impact of pollutants on Arctic systems would benefit from integration into multilateral environmental agreements, including the Stockholm Convention on persistent organic pollutants and the UN Framework Convention on Climate Change."

The application of the international conventions and agreements in the

Arctic region allows several scholars (Young 2012a, Exner-Pirot 2012) to discuss the emergence of regime complexes in the Arctic region. Young (2012a, 4) defines a regime complex as "...a set of elemental regimes or elements that pertain to the same issue domain or spatially defined area, that are related to each other in a non-hierarchical manner." Referring to the Arctic region, Young (2012) and Exner-Pirot (2012) suggest that the national Arctic strategies of the eight Arctic states, and the international conventions and agreements pertaining to the Arctic, including UNCLOS and Polar Code, represent the patterns of a regime complex that governs the actors' behavior.

Overall, the literature holds a positive stance concerning the regime complex formation in the Arctic. Particularly, some works (Young 2012a; Young 2016) suggest that the regime complex approach encourages the participation of non-Arctic states and non-state actors, including indigenous people's organizations and scientists, in negotiations and decision-making processes, as well as in activities of various international organizations dealing with the Arctic issues. In

² Agreement on Cooperation on Aeronautical and Marine Search and Rescue in the Arctic (2013); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (signed 2013); The Maritime Delimitation and Cooperation Treaty in the Barents Sea and the Arctic Ocean (2011); Agreement on the Conservation of Polar Bears (1973).

³ The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972); The International Convention for the Safety of Life at Sea (1974); The Convention on Biological Diversity (1992); Convention for the Protection of the Marine Environment of the Northeast Atlantic (1992)

addition, Young (2012a) and Exner-Pirot (2012) contend that the regime complex approach will allow for better addressing of the emerging environmental and socio-economic challenges in the Arctic region because of the complexity of the Arctic problems, the unpredictable geopolitical situation, and the current constrained scope of Arctic governance development, which is mainly limited to local and national levels.

However, there is some literature (Nilsson, Koivurova 2016; Pelaudeix 2012) that takes a critical stance on the efficiency of the existing regimes and regime complex as a part of Arctic governance. For instance, several works (Pelaudeix 2012) claim that the regime complex approach fails to embrace discussions on incompatible views of different actors, while other works (Nilsson, Koivurova 2016) state that the Arctic states remain the primary actors in defining Arctic governance by adopting international agreements and carrying out economic and political activities in the region.

In addition, Nilsson and Koivurova (2016) question the efficiency of incorporating different conventions and agreements into Arctic governance. In particular, the scholars express concern that linking the Arctic legal regime with global governance might create a case where the regulation of the issues pertaining to the region will be elaborated outside of the region's

governmental structures. As an example, the authors argue that "the existence of the UN Framework Convention on Climate Change has served as an argument to keep mitigation of climate change off the Arctic Council's agenda" (Nilsson and Koivurova 2016, 187). Overall, the discussions on the agreements and conventions as structural parts of the Arctic legal regime and regime complex lead to questioning the structures and institutions that elaborate, implement, and apply all these international and regional legal arrangements.

Conclusion

The existing academic literature on Arctic law development shares a common perception of the need for a central role of law in Arctic governance. At the same time, academic approaches encompass divergent views regarding the future structure of the Arctic legal regime. One type of scholarly literature emphasizes the need for having a unified Arctic Treaty similar to the Antarctic Treaty of 1959. Its major argument states that a Treaty will create a holistic legal regime to regulate different kinds of socio-economic activities in the region. At the same time, such a legal proposal for the Arctic is criticized by several scholars for being not precise about the role and interests of indigenous people in the treaty.

Another type of academic literature emphasizes the already existing

diversity of international and national laws that might be applied to the Arctic region, and, therefore, rejecting the need for the new Arctic Treaty. Importantly, these scholars diverge from a state-centered approach to Arctic governance and try to broaden its notion by encompassing the role of regimes and regime complexes as actors regulating the Arctic activities. More specifically, the literature underscores the role of the UNCLOS and various environmental agreements in setting rules for the state actors' socio-economic activities and climate mitigation and adaptation policies in the Arctic. Drawing on the existing academic literature, the scholarly discussion might be further developed by examining the role of international lawyers and experts in negotiations of the Arctic treaties and conventions, as well as the Arctic states' national legislation. In this case, further research could be developed by studying the decision-making and negotiation process of these national and international documents. Finally, the literature talks about the application of international conventions to regulate certain issue areas in the Arctic region. The further research could be proceeding by examining the role of Arctic governance in enhancing and bringing changes to global environmental governance.

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